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POWEREX CORP., a Canadian Corporation

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DEPARTMENT OF WATER RESOURCES)	Case No. 2:05-CV-00518-GEB-EFB
)	
)	
Plaintiff,)	STIPULATION AND PROTECTIVE
)	ORDER
vs.)	
)	
POWEREX CORP., a Canadian Corporation, dba POWEREX ENERGY CORP., and DOES 1 - 100,)	
)	
Defendants.)	
)	
)	Complaint filed: February 10, 2005

WHEREAS, the parties have agreed upon the terms of a protective order that would cover CONFIDENTIAL INFORMATION for this litigation;

THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the parties hereto, that the following provisions of this Stipulation for Protective Order (the "Protective Order") shall govern disclosure and use of all documents, testimony and other

1 information designated "Confidential Information" which was, is or will be produced or
2 given by any person in the course of formal or informal discovery procedures in this
3 action. The parties intend to allow legitimate discovery while at the same time protecting
4 the rights and interests of the parties regarding Confidential Information.

5 **SCOPE OF THIS ORDER**

6 1. This Protective Order governs the handling of documents and all other
7 information produced by or between the parties to the above-entitled action (the "Action")
8 or by non-parties in connection with the Action, including all documents and information
9 produced pursuant to interrogatories, depositions, requests for production of documents,
10 requests for admissions, subpoenas, or other discovery requests (whether formal or
11 informal), and all information provided by the parties hereto or non-parties in connection
12 with any evidentiary hearings or other proceedings conducted during the course of the
13 Action.

14 **DEFINITIONS**

15 2. Action. As used herein, "Action" means the above-entitled action in the
16 United States District Court for the Eastern District of California, Case No. 2:05-CV-
17 00518-GEB-EFB.

18 3. Confidential Information. As used herein, "Confidential Information" means
19 any Document (as that term is defined below), thing, transcript, material or information, or
20 other information derived therefrom, that the Producing Party (as that term is defined
21 below) has a good faith belief contains personal information, proprietary financial and/or
22 confidential business information, confidential official or governmental deliberations and
23 information, or other information subject to the constitutional, statutory, and case law
24 rights of privacy and protection (including the Personal Information Protection Act, S.B.C.
25 2003, c. 63 ("PIPA")). CDWR recognizes that Powerex Corp. maintains that it is subject
26 to the provisions of PIPA. Part I, Section 1 of PIPA defines "personal information" as any
27 information about an identifiable individual excluding contact information and work
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1 product information. Proprietary financial and/or confidential business information or
2 other information subject to rights of subject to the constitutional, statutory, and case law
3 rights of privacy and protection is information that concerns or relates to a trade secret or
4 other confidential research, development, proprietary, financial or commercial information
5 the disclosure of which may cause harm to the competitive position of the producing
6 party, or other information that may be the subject of a protective order pursuant to any
7 relevant constitutional, statutory, and case law. Such Confidential Information shall be
8 marked "Confidential" or "Confidential Information" and only the persons designated in
9 subparagraphs 11(a) through 11(i) shall have access thereto.

10 4. Disclose. As used herein, "Disclose" means to show, give, make available, or
11 communicate, in any fashion, to any Person (as that term is defined below), any
12 information, Document (as that term is defined below), or information concerning the
13 content of any Document (as that term is defined below), or any portion of the information
14 contained in any Document (as that term is defined below), furnished by any party or
15 non-party in this litigation. This definition shall expressly include information which is
16 communicated during an oral deposition.

17 5. Document. As used herein, "Document" shall include, without limitation, all
18 original written, recorded or graphic matters and all copies thereof, including all "writings"
19 and "recordings" as defined in Rule 1001 of the Federal Rules of Evidence, whether
20 written, recorded, computer-stored, or computer-retrievable information.

21 6. Person. As used herein, "Person" means any natural person, corporation,
22 partnership, proprietorship, group, association, organization, business entity,
23 governmental body, agency, and any agent for the foregoing.

24 7. Producing Party. As used herein, the "Producing Party" is any Person who
25 produces Confidential Information in the Action.

26 8. As used herein, the "Receiving Party" is any party who receives Confidential
27 Information in the Action.

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DESIGNATION OF CONFIDENTIALITY

9. Any party producing or disclosing information in the Action may obtain Confidential Information treatment therefor by designating such information as Confidential information. Whenever a party objects to the designation of produced or disclosed information as Confidential Information, such party may apply to the Court for a ruling that the information should not be so designated, but only after giving fourteen (14) days' written notice of such application to the party asserting such designation. Unless and until this court enters an order changing the designation of the information, it shall be afforded the confidential treatment as provided herein.

10. Any party may, in good faith, designate as Confidential Information that portion of any deposition testimony deemed to contain Confidential Information by advising the court reporter and counsel of record of the beginning and ending of the testimony containing Confidential Information, either orally at the deposition or in writing within 30 days of receipt of the deposition transcript. The reporter shall mark the face of the transcript to designate the beginning and ending of the Confidential Information portions thereof and, if appropriate, a separate original transcript containing the Confidential Information portions, clearly marked on each page as Confidential Information. Copies of the transcript for counsel's use may contain the Confidential Information testimony and other testimony in a single volume.

RESTRICTIONS ON DISCLOSURE OF CONFIDENTIAL INFORMATION

11. Except by prior order of this Court after notice to the Producing Party's counsel, Confidential Information shall not be disclosed to any person other than the following persons:

- (a) the attorneys of record herein and those of their partners, associates and paralegals employed by said attorneys who are assigned to and are necessary to assist such attorneys in the litigation of this Action;

- (b) secretaries, stenographers, investigators and other office or clerical personnel employed by said attorneys and who assist them with respect to this Action;
- (c) the Court (including the Court having jurisdiction of any appeal, necessary court personnel and jurors);
- (d) officers or employees of the parties, to the extent deemed necessary by their respective attorneys of record for litigation of this Action;
- (e) consultants, interpreters or experts retained by the attorneys of record to assist in this Action, to the extent deemed necessary by said attorneys for the litigation of this Action;
- (f) any other person whom the Producing Party agrees in writing may have access to the Confidential Information;
- (g) any person whom the Court, upon notice and an opportunity to be heard, directs may have access to the Confidential Information;
- (h) non-party deponents at their depositions; and
- (i) any person whom a party intends, in good faith, to call as a witness during the litigation or trial of this Action, and that witness's attorneys, if other than those described above.

12. Before any information designated as Confidential Information is disclosed to any person, each such person must first agree in writing to be bound by the terms of this Protective Order by execution of a Declaration of Compliance in the form attached hereto as Exhibit A.

13. Counsel shall maintain a complete list identifying all persons to whom any Confidential Information is disclosed and the Documents or other information so disclosed, and also shall maintain the Declarations of Compliance required by paragraph 12 above.

1 14. All information designated as Confidential Information shall be used only for
2 the purpose of this litigation and shall not be made public by the receiving party, or any
3 agents thereof, or divulged to anyone other than the persons permitted access as set
4 forth in paragraph 11 above. Any person in possession of Confidential Information shall
5 maintain it in a reasonably secure manner to avoid disclosure of its contents.

6 15. In the event that the Receiving Party is requested or required (for example,
7 without limitation, by oral questions, interrogatories, requests for information or
8 documents in a legal proceeding subpoena, civil investigative demand or other similar
9 process) to disclose any Confidential Information, such Receiving Party shall provide the
10 Producing Party with prompt written notice of any such request or requirement so that the
11 Producing Party may seek a protective order or other appropriate remedy and/or waive
12 compliance with the provisions of this Protective Order. Unless the Producing Party
13 waives the protections of this Protective Order, the Receiving Party will not disclose any
14 Confidential Information, except pursuant to the order of a court of competent jurisdiction
15 directing the disclosure of such Confidential Information. To the extent any Receiving
16 Party is subject to a California Public Records Act Request (a "Public Records Request")
17 seeking disclosure of records by governmental bodies, the Receiving Party will refuse to
18 produce Confidential Information during the pendency of this litigation pursuant to
19 California Government Code § 6254(b) (excluding from disclosure "[r]ecords pertaining to
20 pending litigation to which the public agency is a party . . . until the pending litigation or
21 claim has been finally adjudicated or otherwise settled"). Any such Receiving Party
22 receiving a Public Records Request seeking Confidential Information will work in good
23 faith to notify the Producing Party promptly so that the Producing Party can take whatever
24 additional steps it deems prudent in response to such a Public Records Request.

25 16. The disclosure of Confidential Information by the Producing Party to persons
26 other than those defined in paragraph 11 above shall not, in and of itself, waive
27 confidentiality to this Action. In addition, the inadvertent or unintentional disclosure by the
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1 Producing Party of Confidential Information, regardless of whether the information was so
2 designated at the time of disclosure, shall not waive in whole or in part of a party's claim
3 of confidentiality, either as to the specific information disclosed or as to any other
4 information relating thereto or on the same or related subject matter.

5 17. If additional persons become parties to this Action, they shall not have access
6 to Confidential Information produced by or obtained from any party until the newly joined
7 party or their counsel confirms in writing to all other parties that they have read this
8 Protective Order and agree to be bound by its terms.

9 **FILING AND USE IN COURT OF CONFIDENTIAL MATERIAL**

10 18. If any party files with or submits to the Court any (a) Documents, responses,
11 transcripts or things designated as Confidential Information pursuant to this Protective
12 Order, or information derived therefrom, or (b) any affidavits, memoranda, exhibits or
13 other papers containing or making reference to any such confidential Documents,
14 responses, transcripts or things, or any information contained therein, then such
15 materials or portions thereof that contain Confidential Information shall be filed under seal
16 according to the process described in *Local Rule 39-141, particularly* Local Rule 39-
17 141(d), of the United States District Court for the Eastern District of California.

18 19. The parties shall refrain from referring in open court to the Confidential
19 Information contained in the filed documents except under such conditions and
20 safeguards as the Court may impose to protect against its disclosure. If any Confidential
21 Information is introduced, referenced or otherwise used in any court proceeding in this
22 Action, it shall not lose its confidential status through such use.

23 20. If counsel for a party to this Action desires to identify, discuss, disclose, or
24 otherwise use materials or the contents of materials designated as Confidential
25 Information during the course of pretrial or trial hearings, he or she shall, prior to such
26 identification, discussion, disclosure, or use, make reference to the confidential nature
27 thereof to counsel for the party producing such materials; and counsel for the party
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1 producing such materials may at the time of or after such identification, discussion,
2 disclosure, or use, request that any portion of any transcript wherein such materials are
3 identified, discussed, disclosed, or used, and any exhibits wherein materials or the
4 contents of materials designated Confidential Information are identified, discussed,
5 disclosed, or used, be filed under seal with this court *according to the process described*
6 *in Local Rule 39-141*, and be accorded the protections afforded by this Protective Order.

7 21. Nothing herein shall be deemed, construed or asserted to affect in any way a
8 party's right to object to the taking or admissibility of any testimony or other evidence
9 where such objection is based on a ground other than that the testimony or evidence
10 involved Confidential Information. Nothing herein shall be construed to limit in any way a
11 Producing Party's use of its own Confidential Information by itself or any agent of the
12 producing party.

13 **CONFIDENTIAL MATERIAL AT END OF ACTION**

14 22. After the final and non-appealable termination of this Action, and after the
15 expiration of the applicable time period during which any party must, by law, maintain
16 complete files, Confidential Information and all copies thereof shall be destroyed. A
17 certificate attesting to such destruction must be delivered to the party who provided the
18 Confidential Information within 30 days following such destruction. All provisions of this
19 Protective Order restricting the communications or use of Confidential Information shall
20 continue to be binding after the conclusion of this Action. This paragraph does not
21 require the return, disclosure or destruction of materials protected by the attorney-client
22 privilege or work product doctrine. In addition, counsel for each party may retain one
23 complete set of deposition transcripts and court filings in this Action.

24 **RELIEF FROM ORDER**

25 23. This Protective Order, or any portion thereof, may be modified, amended or
26 vacated by further order of the Court upon the motion of any party. This Protective Order
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1 is without prejudice to all rights of the parties regarding discovery as set forth in the
2 Federal Rules of Civil Procedure.

3 24. In the event anyone shall violate or threaten to violate any terms of this
4 Protective Order, the aggrieved party may immediately apply to the Court to obtain
5 injunctive relief against such person. In addition, the aggrieved party may seek actual
6 damages resulting from any violation of the terms of this Protective Order.¹ However, the
7 existence, if any, of an adequate remedy at law shall not preclude the aggrieved party
8 from obtaining injunctive relief. The Court shall retain jurisdiction over such person for
9 the purpose of enforcing this Protective Order.

10 **DECLASSIFICATION PROCEDURE**

11 25. A party objecting to a Confidential Information designation shall attempt to
12 resolve the disagreement informally with the producing party or designating third party. If
13 no resolution can be reached, the party desiring the Confidential Information designation
14 may present the matter to the Court for a ruling on the confidentiality of the material
15 designated as Confidential Information, *according to the process described in Local Rule*
16 *39-141*. The party or third party asserting the Confidential Information designation shall
17 have the burden of justifying that Confidential Information designation. Until the Court
18 rules otherwise, the challenged Discovery Material shall be treated as Confidential as set
19 forth herein.

20 **ADDITIONAL TERMS**

21 26. This Protective Order is entered solely to facilitate the exchange of
22 information between the parties of this Action without involving the Court unnecessarily in
23 this process. Nothing in this Stipulation for Protective Order, nor the production of any
24 documents or disclosure of information pursuant to this Protective Order, shall be
25 deemed to have the effect of an admission or waiver, including waiver under the rules of

26 _____
27 ¹ *Although the court is approving this stipulation, an aggrieved party seeking actual damages*
28 *based on an alleged violation of this Protective Order shall be required to cite statutory or case*
authority establishing a right of action for damages.

1 evidence, by any party or non-party that has agreed to be bound by this Protective Order;
2 or of altering the confidentiality or non-confidentiality of any such information, or of
3 altering any existing obligation of any party or non-party, or the absences of such
4 obligation.

5 27. All Confidential Information disclosed in this litigation shall be used solely for
6 this litigation, and not for any business, competitive, or other purposes whatsoever.

7 28. Any documents filed with the Court that contain any confidential, secret, or
8 proprietary information, or which are otherwise protected under the terms of this
9 Protective Order, shall be filed under seal according to the process described in Local
10 *Rule 39-141* of the United States District Court for the Eastern District of California, as
11 mentioned in paragraph 18, above. Under no circumstances shall it be deemed a waiver
12 of the protections set forth in this Protective Order that any party submits any document
13 or information to the Court in connection with any hearing, proceeding, or trial.

14 29. In keeping with existing ethical duties, all counsel shall at all times keep
15 secure all notes, abstracts, or other items or work product derived from or containing, any
16 Confidential Information, or otherwise covered by this Protective Order.

17 30. This Stipulation for Protective Order shall survive the final determination of
18 this Action and shall remain in full force and effect after conclusion of all proceedings
19 herein to provide the Court with ancillary jurisdiction to enforce its terms.

20 31. This Stipulation may be signed in counterparts.

21
22 CONSENTED TO:

23 Dated: December 26, 2008

BRACEWELL & GIULIANI LLP

24
25 By /s/ Andrew Edison
26 J. Clifford Gunter III
27 Andrew M. Edison
28 ATTORNEYS FOR DEFENDANT
POWEREX CORP.

1 Dated: December 24, 2008

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3
4 By /s/ Gary Alexander
5 For Annadel Almendras
6 Deputy Attorney General
7 California Department of Justice
8 Office of the Attorney General
9 ATTORNEYS FOR PLAINTIFF
10 CALIFORNIA DEPARTMENT OF
11 WATER RESOURCES BY AND
12 THROUGH ITS CALIFORNIA ENERGY
13 RESOURCES SCHEDULING DIVISION

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15 **ORDER**

16 Good cause appearing therefor, the Court hereby Orders that the Stipulation for
17 Protective Order is approved in its entirety and shall govern the use and treatment of
18 Confidential Information in this Action until further order of this Court.

19 IT IS SO ORDERED.

20 DATED: January 21, 2009.

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EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

DECLARATION OF COMPLIANCE

I hereby declare that I, _____, residing at _____, in the City/County of _____ and State of _____, am about to receive Confidential Information supplied in connection with the litigation entitled Cause No. 2:05-CV-00518-GEB-EFB; *California Department of Water Resources vs. Powerex Corp.*, in the United States District Court for the Eastern District of California (the "Action"). I certify my understanding that such information is to be provided to me pursuant to the terms and restrictions of the Stipulation for Protective Order in the Action and that I have been given a copy of and have read said Stipulation for Protective, and I agree to be bound by the terms thereof. I understand that such information and the copies I make of any documentary material containing Confidential Information or any notes or other records that may be made regarding any of such information shall not be disclosed to any persons other than those persons to whom such information may be disclosed pursuant to the Stipulation for Protective Order.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

HOUSTON/2171006.5